In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-477

NOEL LEE LIPPMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that (1) the government failed to prove the essential elements of the crime of preventing the communication of information relating to the violation of a criminal statute of the United States (18 U.S.C. 1510) and of conspiracy to commit that substantive offense; (2) his Fourth Amendment rights were abridged by the introduction at trial of an electronic recording of a conversation made with the consent of one party to the conversation; and (3) the court's instructions to the jury were erroneous.

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner, an attorney, was convicted on a two-count indictment charging conspiracy and substantive violations of 18 U.S.C. 1510 (obstructing the communication to a criminal investigator of information relating to a federal offense).

He was sentenced to concurrent terms of one year's imprisonment on each count, six months of which were suspended, and placed on probation for eighteen months on condition that he not practice law. He was also fined $2,500. The court of appeals affirmed (Pet. App. B).

The evidence showed that co-conspirator Leonard Staffel,[1] a Detroit dentist, and Edward Zuber, were engaged in smuggling large quantities of marijuana into the United States from Mexico. The two agreed that in the event of "trouble" they would support one another. After being arrested and freed on bail, Zuber contacted Staffel and requested $25,000 for legal expenses (Tr. 147, 226). Staffel thereupon provided $15,000 and indicated that he would provide for Zuber's other legal and family expenses (Tr.147-148, 416-418, 464-465).

After being questioned by federal agents, Staffel became apprehensive and contacted petitioner, with whom he discussed the above events in detail (Tr. 149-153). Petitioner thereupon advised Staffel to flee the country, and Staffel accordingly departed for the Bahamas after having signed—at petitioner's behest—a power of attorney to insure the payment of petitioner's fees (Tr. 154-157).

Staffel subsequently returned to the United States, at which time Zuber made further requests for money— indicating that unless he received the money he would cooperate with the authorities (Tr. 420). Petitioner told Staffel to continue to assist Zuber financially and urged him to pay all Zuber's expenses, including airplane fare and hotel bills. Staffel followed petitioner's advice, providing Zuber with expense money, an airline

[1]Staffel pleaded guilty and was sentenced to two concurrent four-year prison terms. He testified as a government witness at petitioner's trial.

ticket, and free dental services for Zuber's wife (Tr. (Tr. 191-195, 442-445, 160-162, 166). In addition, petitioner secured counsel for Zuber's preliminary hearing with $3,500 of Staffel's funds, over which he had control (Tr. 886-889). Petitioner also helped Staffel secure a loan with which to pay Zuber's continuing legal expenses, $4,000 of which he retained for himself as compensation for representing Zuber.

Unbeknownst to petitioner and Staffel, Zuber subsequently told the police all he knew. Zuber then arranged a meeting between himself, petitioner, and Staffel at which Zuber carried a concealed recording device. The resultant tapes disclosed that during the meeting Staffel, with petitioner's assistance, sought to secure Zuber's silence.[2]

---

[2]The tapes introduced into evidence at trial (Appellant's appendix in the court of appeals, pp. A20-A21) contain the following colloquy:

[PETITIONER]: Let me say this to you, let me, let me put it, honest, Doc [Staffel]. If he would go to prison, then you got to make sure his old lady is taken care of. I mean it, you know, if it's a question of his life or yours, you got to follow through with his old lady. I'm not so sure she's not going to be independently wealthy herself, you know, with all the money you got rolling for you, but still, with a little luck you've got an obligation there because I really see it as honestly Doc as uh, I mean a hundred bucks a week ain't gonna kill you, that may be the difference; or $200.00 a week, and it may be the difference for her.

STAFFEL: Well if you said a hundred bucks a week, I'd go along, but if you're going to say that I'm going to go ahead and have like $500 a week, or * * *

1. Petitioner contends that the govenment failed to prove two essential elements of 18 U.S.C. 1510: that the defendant willfully endeavored to prevent the communication of information relating to the violation of a United States statute, and that he possessed knowledge that the informant was attempting to pass information to the authorities. *United States* v. *Williams,* 470 F. 2d 1339 (C.A. 8). Petitioner argues that the evidence shows that Zuber extorted assistance from Staffel and petitioner and thus that the offense was not proved.

The defense of coercion to a bribery charge is, however, a question to be decided by the jury.[3] Here, the

---

[PETITIONER]:	All right, nobody's asking you to kill yourself, but you got to make sure she's taken care of.
* * * * *	
STAFFEL:	All right, if you want a deal and you get hung up, OK? Then I can send your wife a check every week for $100.00. OK?
ZUBER:	Ah, a hundred dollars, what's a hundred fucking dollars?
STAFFEL:	See what I mean?
[PETITIONER]:	Well, how much do you want?
ZUBER:	A couple hundred or something.
[PETITIONER]:	A couple hundred; that's reasonable; he's got five kids.
STAFFEL:	You got five?
ZUBER:	Yea, I got five. You been to my fucking house, you know how many kids I got.
[PETITIONER]:	Yea, I would think $200.00 a week would be reasonable.

[3]See *United States* v. *Barash I,* 365 F. 2d 395, 402 (C.A. 2); *United States* v. *Barash II,* 412 F. 2d 26, 29-30 (C.A. 2); *United States* v. *Kahn,* 472 F. 2d 272, 277-279 (C.A. 2), certiorari denied, 411 U.S. 982; cf. *United States* v. *DeMet,* 486 F. 2d 816, 820, n. 3 (C.A. 7).

court instructed the jury that it could find petitioner guilty only if it found that he had provided funds to Zuber with specific intent to buy his silence, but that it must acquit if petitioner's actions were because of threats by Zuber (Tr. 1102-1105). The jury found, and the evidence adduced at trial was sufficient to support its finding (*Glasser* v. *United States*, 315 U.S. 60, 80), that petitioner and Staffel bribed Zuber into maintaining silence.

Moreover, the evidence was sufficient for the jury to conclude that petitioner knew that Zuber was attempting to pass information to the authorities.[4] The record reveals numerous instances in which petitioner was informed that Zuber intended to cooperate with the investigation (Tr. 420, 149-153).[5]

---

[4]*United States* v. *Cameron*, 460 F. 2d 1394 (C.A. 5), cited by petitioner (Pet. 17), does not, as he suggests, stand for the proposition that Section 1510 was not intended to address communications between alleged accomplices. In *Cameron*, the indictment involved was deemed inadequate because it charged that the defendant Cameron and one Wright together sought to impose silence on Wright with respect to a prior criminal act committed by the two, an obviously illogical allegation. It did not hold that one party to a prior criminal act might not be charged with bribing or intimidating a co-conspirator into silence. Nor is *United States* v. *Williams*, *supra*, apposite. In *Williams*, the court decided only that upon the facts of that case insufficient evidence was adduced by the government to prove that a particular defendant had known that another individual knew of information concerning a federal offense and was inclined to reveal it to the authorities.

[5]We fail to understand petitioner's argument that, because Zuber had already agreed to assist the authorities at the time of the taped conversation, the offense outlined in Section 1510 could not be committed. Staffel and petitioner were not aware of Zuber's agreement at that time. Therefore, their continued efforts to secure Zuber's silence clearly fell within the ambit of the statute's prosciption, which applies to "endeavors" and does not turn upon the success of the attempt.

2. Petitioner also contends that the conversations recorded with Zuber's assistance were improperly admitted at trial, because Zuber's consent was improperly obtained with promises of leniency. It is well-established, however, that a conversation may be legally intercepted with the consent of one party to the dialogue. See, *e.g.*, *United States* v. *White*, 401 U.S. 745; *Lopez* v. *United States*, 373 U.S. 427. Moreover, consent is no less voluntary because it was elicited by way of "plea bargaining." *Santobello* v. *New York*, 404 U.S. 257; see *United States* v. *Walker*, 320 F. 2d 472, 473-474 (C.A. 6), certiorari denied, 375 U.S. 934; *United States* v. *Zarkin*, 250 F. Supp. 728, 737 (D. D.C.). Here, the court properly found that Zuber had consented to the interception of this conversation. Zuber stated at the suppression hearing (Tr. 63):

> I didn't mind at all. I wanted to go against Staffel and when it was brought up I said "Fine, I'll wear a tape or whatever it takes."

A federal agent further testified that the only promises made were that if Zuber would render assistance, such action would be brought to the attention of the prosecuting attorney in his own case (Tr. 85).

3. Finally, contrary to petitioner's assertions, the court's entrapment instruction—although perfectly adequate—need not have been provided at all. As the court of appeals found, petitioner's activities in seeking to secure Zuber's silence were commenced well before government agents became involved in the matter. See *United States* v. *Russell*, 411 U.S. 423; *Osborn* v. *United States*, 385 U.S. 323, 331.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1974.